ROHANA ARIFFIN

v.

UNIVERSITI SAINS MALAYSIA & ANOTHER CASE

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 32-17-86 & CONSOLIDATED WITH O.M. 32-19-86]
24 NOVEMBER 1986

ADMINISTRATIVE LAW: *Certiorari - Leave to apply for order of certiorari - Council of University dismissing applicants' appeals from decisions of Disciplinary Authority - Rules of University Sains (Discipline of Staff) Rules 1979 - Leave granted to apply for order of certiorari - Hearing of substantive motion - Affidavit of service to be effected before motion or summons is entered for hearing - When must affidavit of service be filed - 14 days period - Leave granted on 21 May 1986 - Service effected on 29 October 1986 - Affidavit of service filed on 3 November 1986 - Whether applications for order of certiorari incompetent - Respondent represented when ex parte application for leave to issue certiorari was heard.*

There were two applications for orders of *certiorari* to quash the decision of the respondent who dismissed the appeals of the applicants from the decisions of the disciplinary authority of the respondent. The preliminary objection was that O. 53 r. 2(4), Rules of the High court 1980 had not been complied with as the affidavit of service had not been filed before the motion was set down for hearing. The applications had been served within the period prescribed in O. 53 r. 2(1) and the affidavit of service was filed before the hearing. The respondent was represented when the *ex parte* application for leave to issue *certiorari* was heard.

Held:

[1] The applicant for *certiorari* must clear two hurdles as required under O. 53 of the Rules of the High Court 1980. In the first stage he must seek, by *ex parte* application, filed not later than 6 weeks from the date of the impugned judgment, order, conviction or other proceeding, the leave of the Court to apply for the order of *certiorari*. If leave is granted, the second stage is the substantive application for the order itself pursuant to O. 53 r. 2(1) Rules of the High Court 1980 which the applicant or his solicitor must next enter a motion or summons as the case may be within 14 days of the grant of leave - O. 53 r. 2(2) RHC 1980.

[2] In this case, not only had the applicants obtained leave but had also entered their substantive applications for *certiorari* within the periods limited under the Rules but for the defaults if there were - being limited to the service of the applications and the filing of the affidavit of service within the periods contended for the respondent.

[3] However, since the object of the requirements as to service is to put the respondent on notice at the earliest opportunity so that he does not take any further steps to the prejudice of either or both parties, the Court was of the view that the respondent could not have suffered any prejudice nor indeed could it even have alleged any as the respondent's Counsel was in fact present when the application for leave was heard before Harun J and he must

therefore be assumed to have had notice of the intended substantive application for *certiorari* and of the grounds therefor.

[4] Since the applicant's Counsel had accounted for the delay in effecting service to the Court's satisfaction, the Court made the required orders for extension of time by virtue of the powers conferred upon the Court by O. 2 r. 1(1) and O. 3 rr. 5(1) and (2) Rules of the High Court respectively.

[Preliminary objection dismissed. Costs to be paid by respondent to applicants in any event.]

Cases referred to:
Jasabena Sdn. Bhd. v. Beh Heng Poo [1985] 1 MLJ 394
Rex v. Leicestershire Justice [1850] 15 QB 88
Mayor v. Harding [1867] LR 2 QB 410
Harding v. Price [1948] 1 KB 695
Metroinvest Ansal v. Commercial Union [1985] 1 WLR 513
Gan Hay Chong v. Siow Kian Yuh [1975] 2 MLJ 129
Secretary of State for Defence v. Warn [1970] AC 394
Mersing Omnibus v. Minister of Labour [1983] CLJ (Rep) 266
Soho Square Syndicate Ltd. v. E. Pollard & Co. Ltd. [1940] Ch 638
Bowmaker, Ltd. v. Tabor [1941] 2 KB 1

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), O. 3 rr. 5(1), (2), O. 8 r. 3(4), O. 53 rr. 1A, 2(1), (4), O. 62 r. 3, O. 92 r. 1

For the applicants - Haji Sulaiman bin Abdullah; M/s. Zain & Co.
For the respondent - N.G. Sivanandan; M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

In these two consolidated applications by Rohana bte Ariffin and Hashim Hussin Yaacob, both lecturers in Sociology and Development Studies at the Universiti Sains, Malaysia, the respondent herein, made pursuant to leave granted by Harun J on 21 May 1986, for *Orders of Certiorari* to remove into this Court for the purpose of they being quashed two separate decisions dated 10 March 1986 of the Council of the respondent University dismissing their appeals from decisions of the Disciplinary Authority of the respondent University whereby, in the case of Rohana, she was found guilty of a single count and, in the case of Hashim, he was found guilty of four out of six counts, in contravention of certain Rules of the Universiti Sains (Discipline of Staff) Rules, 1979, on grounds of bias, denial of natural justice and error of law apparent on the face of the record, a preliminary objection by Counsel for the respondent was before me.

It was argued that although the applicants had obtained the necessary leave for the commencement of these proceedings and had entered them by filing within the periods limited by O. 53 rr. 1A, 2(1) and 2(2), respectively, they had defaulted in respect of two other requirements. It was said that because O. 53 r. 2(4) requires an affidavit of service to be filed before the motion or summons is entered for hearing, service must, in practice, be effected

within 14 days after the grant of leave and since, in both cases, leave was granted on 21 May 1986, such service effected only on 29 October 1986 and the affidavit of service filed only on 3 November 1986, the applications were incompetent and should therefore be dismissed *in limine*.

Before I embark upon a consideration of the preliminary objection, it may be pertinent to mention certain facts by way of background.

At the time when the applications for leave to commence *certiorari* proceedings were heard, there were also heard immediately before this, applications by the respondent for transfer of "all proceedings" from the High Court in Kuala Lumpur to the High Court in Penang. In the result, after hearing Counsel for both parties and the Federal Counsel who appeared on behalf of the Attorney General who, although served was not a party, Harun J granted leave to commence *certiorari* proceedings, made an order amending the originating summonses therein by converting them into originating motions and, lastly, ordered the transfer of the proceedings to the High Court, Penang.

Clearly, therefore, the respondent had, in fact ample notice even before leave was granted that the applicants intended applying for *Orders of Certiorari* and no question of prejudice could arise nor for that matter could any have been alleged having regard to the circumstances.

I must now revert to the preliminary objection.

In considering the dry question of law posed by the preliminary objection I found it necessary to analyse the procedure governing applications for *certiorari*.

It is manifestly clear, from the provisions of O. 53 that the applicant for *certiorari* must clear two hurdles. In the first stage he must seek, by *ex parte* application, filed not later than 6 weeks from the date of the impugned judgment, order, conviction or other proceeding, the leave of the Court to apply for the order of *certiorari* and then, if leave is granted, the second stage is the substantive application for the order itself: Order 53 r. 2(1). The applicant or his solicitor must next enter a motion or summons as the case may be within 14 days of the grant of leave: Order 53 r. 2(2). This is done by filing sufficient copies of the motion or summons in the Registry of the High Court within the required period: see *Jasabena Sdn. Bhd. v. Beh Heng Poo* [1985] 1 MLJ 394. Service of the notice of motion or summons on all necessary parties will then have to be effected: Order 53 r. 2(3), and there must be at least 8 clear days between the service and the day named therein for the hearing: Order 53 r. 2(1).

So far so good; but, there then arises a difficulty because O. 53 r. 2(4) states that an affidavit of service must be filed **before** the motion or summons is entered for hearing.

One does not readily conceive the idea of service of a copy of notice of motion or summons before the original has been filed in the Registry, signed and sealed by the proper officer and assigned a number.

Support for this proposition may be derived from the following rules:

Order 8 r. 3(4) provides:

> Issue of the notice takes place upon it being sealed by an officer of the Registry

Order 62 r. 3 provides

> Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time it is left, showing him -
>
> (a) in the case where the document is a writ or other originating process, the sealed copy.

Order 53 r. 2(1) provides, *inter alia*

> ... unless the Court or a Judge granting leave has otherwise directed, there must be 8 clear days between the service of motion or summons and the day named therein for the hearing.

The combined effect of the above rules led me to uphold the submission by Counsel for the applicants that since it is impossible to serve a notice of motion before it is filed it would be equally impossible to file an affidavit of service before the motion is entered for hearing. The point was emphasised and, if I may say so, quite rightly, that until the notice of motion is filed there is no pending matter or Court file in which the affidavit could be filed.

The maxim is *lex non cogit ad impossibilia* (the Law does not compel anyone to do impossible things). It is not difficult to cite an anthology of cases in support thereof. My choice is as follows:

In *Rex v. Leicestershire Justice* [1850] 15 QB 88, an Act provided that an appellant should send notice to the respondent of his having entered into a recognisance, in default of which the appeal should not be allowed, it was held that the death of the respondent was not fatal to the appeal and dispensed with the service.

In *Mayor v. Harding* [1867] LR 2 QB 410, s. 2 of the Summary Jurisdiction Act 1857, made the transmission by the appellant of a case stated by justices to the superior Court named in his application within three days of receiving it a condition precedent to the hearing of the appeal. Nevertheless, the requirement was dispensed with on the ground of impossibility because the Court was closed during those three days.

In *Harding v. Price* [1948] 1 KB 695 the driver of a trailer was prosecuted under s. 22(2) of the Road Traffic Act, 1930, for failing to report a collision involving his vehicle and a stationery car. The facts disclosed that because of the noise made by the trailer he was unaware that the collision had occurred. It was held that he was not guilty of the offence. Lord Goddard observed, pithily,

> "If the duty be to report, he cannot report something of which he has no knowledge ... Any other view would lead to calling upon a man to do the impossible.

It is obvious, therefore, that before a notice of motion or summons can be served it must be signed and sealed by a proper officer of the Registry and a date of hearing entered therein.

But, I had to go further and answer the question: when must the affidavit of service be filed?

I would say that since under O. 53 r. 2(4) it is at the second stage, that is to say, on the date of the hearing of the substantive application for *certiorari* itself, that the Judge will require proof by affidavit of the service of copies of the notice or summons, there is, in my view, sufficient compliance with the rule if the affidavit is filed before such date. The affidavit of service is after all formal in nature and the object of the rule will be sufficiently met if it is before the Judge before the hearing of the motion or summons. In the present cases it was not disputed that the affidavits of service were filed before the hearing.

There was, however, at first glance, more substance in the submission that both the content and timing of the affidavit of service necessarily mean that service of the motion or summons must in practice be effected within 14 days after the granting of leave. The following passage, appearing at p. 82 of Mr. Gordon's book on *Judicial Review: Law and Procedure* (1985 Edn.), was quoted in support, the equivalent English Rule being O. 53 r. 5(6) which is in *pari materia* with our O. 53 r. 2(4):

> The content and timing of the affidavit necessarily mean that service of notice of the application must be effected within the fourteen-day period. Failure to do so will prevent an affidavit from being filed and the motion being entered for hearing.

But, reflection reveals that the above passage must be read subject to the consideration, that it is based on the English practice where, unlike here, motions are normally heard every weekday (except the last day of each sittings) - see *Practice Direction* [1980] 2 AER 750. It should also be recognised that in England, High Court Judges are more numerous than in this country. The applicant is therefore virtually at liberty to stipulate the date of hearing.

Moreover, O. 53 r. 2(1), the material portion of which I have reproduced above, puts paid to this objection by the respondent. This is a specific measure and must therefore override the more general provisions of O. 53 r. 2(4) so far as they may be inconsistent with it.

There was no dispute that the substantive applications in these cases were served more than 8 days before the date of hearing named in the notice of motion.

I would add that O. 53 r. 2(4) seems to have the effect of puzzling or perplexing an applicant and consideration should perhaps be given by the Rules Committee to redrafting it, regard being had to local conditions, to achieve greater clarity, accuracy and helpfulness.

If, contrary to my primary opinion, I was wrong in the view I had taken regarding this part of the case, and there had been a breach of O. 53 r. 2(4) then, having regard to the circumstances, especially the fact that the respondent had suffered no prejudice, I condoned the breach by virtue of the powers conferred upon me by O. 2 r. 1(1).

In amplification of this part of the case, I would add a word or two.

First, I did not consider the non-compliance here - if non-compliance there was - to be so fundamental a defect in procedure that I ought not to have exercised my discretion to disregard it. This case clearly illustrated that though the provisions of O. 53 may appear to be comprehensive their application, having regard to local conditions, including the pressures of overcrowded judicial lists, is not free from doubt or difficulty.

Secondly, I was told by Counsel for the applicants and, I took it to be correct, that this was the first time that the discipline of Staff Rules of any University had come up for

interpretation by the Malaysian Courts. Consequently, the issues arising upon these applicants would most probably be of interest not merely to these applicants but generally to all academics and Universities in this country. These issues would relate to the extent of permissible criticism, academic research and comment and defences available to academics facing disciplinary charges. It would be a pity therefore if the determination of such issues was precluded by reason of the applications being nipped in the bud, so to speak, for non-compliance with rules or procedure, particularly where, as here, the respondent has suffered no prejudice of any sort.

I would therefore pray in aid the following passage in the judgment of Cumming-Bruce in *Metroinvest Ansal v. Commercial Union* [1985] 1 WLR 513, 521:

> I would say that in most cases the way in which the Court exercises its powers under O. 2, r.1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O. 2 r.1(2) as being so framed as to give the Court the widest power in order to do justice.

In any event, therefore, if it was not open to me to act under O. 2 r. 1(1), then so far as may have been necessary, I had no hesitation in making the necessary orders for extension of time in the exercise of my discretion by virtue of the provisions of O. 3 r. 5(1) and (2) having regard to all the circumstances in order to satisfy the insistent demands for justice.

Most particularly, in exercising my discretion I took into consideration the fact that there might have been here a mistake on the part of the applicants' solicitor in the interpretation of a complex set of rules which, so far as I am aware, had never been judicially considered in any reported case of our Courts, as a result of which, it might be said, that the applicants had fallen foul of the time limits imposed by the Rules of Court. If so, I did not consider that they ought to suffer for their solicitor's mistakes regard being had to the particular circumstances of their cases. I considered that such a mistake - if mistake there had been - could and should be a ground for extension of time and I so ordered.

The authority I should like to cite in support of this proposition is the following passage in the judgment of Chang Min Tat FJ in *Gan Hay Chong v. Siow Kian Yuh* [1975] 2 MLJ 129 @ p. 131:

> He concluded that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. If he had taken the view that, the mistake of the appellant's solicitors in the circumstances of this case were not such a ground, his view would, with respect, be unexceptionable **but as a general dictum, it went, to my mind, too far.**

I therefore dismissed the preliminary objection and directed that the applications be heard on the merits.

The remaining point in these applications may be dealt with shortly.

It was lastly objected that certain exhibits annexed to the affidavits filed in support of the application in the National Language were not accompanied by a certified or verified English translation contrary to O. 92 r. 1. It was submitted by Counsel for the applicants, and I agreed, that the exhibits were in fact translated in the affidavits concerned so that the omission was immaterial. In any event, it was not suggested that the respondent was in any way prejudiced, so that even if there had been a non-compliance, such as was alleged, I had no hesitation in holding that the omission was one which could be readily condoned under the provisions of O. 2 r. 1(1).

Looking back, I should add, lest I be accused of an oversight, that I had not overlooked the oft cited *dictum* of Lord Hodson in *Secretary of State for Defence v. Warn* [1970] AC 394, 402 referred to with approval by Abdoolcader FJ (as he then was) in *Mersing Omnibus v. Minister of Labour* [1983] CLJ (Rep) 266 that

> "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case."

In the *Mersing* case, the High Court had granted leave to commence *certiorari* proceedings even though the application for leave was made out of time and no extension of time sought or the delay accounted for to its satisfaction. It was held, on appeal, that leave should not have been granted and that the High Court had no jurisdiction to do so. This decision is, of course, wholly in accord with the principle that regulations governing the practice and procedure of Civil Courts, which go to the jurisdiction - and a requirement for leave, is such a matter - are in the general interest, and cannot be waived: (See e.g. *Soho Square Syndicate Ltd. v. E. Pollard & Co. Ltd.* [1940] Ch 638; *Bowmaker, Ltd. v. Tabor* [1941] 2 KB 1.

In the present case, unlike the *Mersing* case, not only had the applicants obtained leave but had also entered their substantive applications for *certiorari* within the periods limited under the Rules. Their only defaults - if defaults there were - being limited to the service of the applications and the filing of the affidavit of service within the periods contended for the respondent. The *Mersing* case was, therefore, clearly distinguishable.

When one considers that the object of the requirements as to service is to put the respondent on notice at the earliest opportunity so that he does not take any further step to the prejudice of either or both parties, the objection loses most, if not all, its sting. I have already pointed out that Counsel for the respondent, was in fact present when the application for leave was heard before Harun J and must therefore be assumed to have had notice of the intended substantive application for *certiorari* and of the grounds therefor. As I have said, there could therefore have been no question of the respondent having suffered any prejudice nor indeed could it even have alleged any.

Moreover, Counsel for the applicants had accounted for the delay in effecting service to my satisfaction. It was for these reasons that, assuming, contrary to my primary opinion, service of the applications and filing of the affidavit of service had been effected out of time, so far as may have been necessary, I condoned the defaults and by way of alternative, I made the required orders for extension of time by virtue of the powers conferred upon me by O. 2 r. 1(1) and O. 3 rr. 5(1) and (2) respectively.

Finally, I saw no reason why costs of the preliminary objection should not follow the event; that is to say that they had to be paid by the respondent to the applicants, in any event, and I so ordered.

Also found at [1988] 1 CLJ 559